88-876

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1988

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, d/b/a Village Inn Plaza; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT and G. RICHARD KATZENBACH,
Petitioners,

v.

MANUEL BENET GIRALT, a/k/a MANUEL BENET,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED

1. Did Congress envision that the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 et seq. ("Act"), apply to the sale or lease of virtually any interest in real estate that includes the right to exclusive use?

2. Did the Colorado Court of Appeals err when it enlarged the scope of the Act to apply to petitioners' parking spaces?

3. Did the Trial Judge's refusal to withdraw from the case, in light of his secret knowledge of a possible bias, violate petitioners' Fourteenth Amendment rights to due process?

PARTIES TO PROCEEDINGS BELOW

The only parties to this proceeding in the Court below are those indicated by the caption of this case.

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OPINIONS BELOW

The opinion of the Colorado Court of Appeals, which petitioners seek to have reviewed by this Court, is reported at 759 P.2d 801 (Colo. App. 1988).

JURISDICTIONAL GROUNDS

A. The judgment of the Colorado Court of Appeals sought to be reviewed by petitioners was entered on March 31, 1988. The Court of Appeals denied petitioner's Petition for Rehearing on April 28, 1988.

B. The Colorado Supreme Court denied petitioners' Petition for Writ of Certiorari on August 29, 1988. Petitioners' instant Petition is being filed within 90 days of August 29, 1988.

C. Jurisdiction of this Court to review the judgment of the Colorado Court of Appeals is conferred by 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Colorado Constitution, Article VI, Section 23: The pertinent text of this constitutional provision is fully set forth in the appendix.

STATUTES:

Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1703: The pertinent text of this statute is fully set forth in the appendix.

Colorado Condominium Ownership Act, C.R.S. § 38-33-103: The pertinent text of this statute is fully set forth in the appendix.

Judicial Disciplinary Hearings, C.R.S. §§ 24-72-401, 402: The pertinent text of this statute is fully set forth in the appendix.

Colorado Rules of Judicial Discipline, Rule 6: The pertinent text of this rule is fully set forth in the appendix.

REGULATIONS:

24 C.F.R. § 1710.1:

Definitions:

> "'Lot' means any portion, piece, division, unit or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land."

STATEMENT OF THE CASE

On August 3, 1983, respondent brought this action in Eagle County, Colorado District Court ("Trial Court") seeking to recover a total of $185,000 in deposits on two condominium units in petitioners' Village Inn Plaza project ("Project") in Vail, Colorado. The Project consists of 29 residential units, 4 commercial units and 107 parking spaces. On August 21, 1984, respondent filed a Motion for Partial Summary Judgment to void the purchase agreements and recover his deposits, pursuant to the Act. At issue was the applicability of the Act's reporting and disclosure requirements to the Project. 15 U.S.C. §§ 1702 (a).

On January 9, 1985, the Trial Court considered the motion, immediately decided in favor of respondent, entered its order and declared the partial summary judgment dispositive of all claims. The Trial Court ruled that the Act did

apply to the Project, ordered rescission of the purchase agreements and reimbursement of respondent's deposits, plus interest. On March 14, 1985, the Trial Court denied petitioners' Motion for Reconsideration and entered its final order.

Petitioners then filed their appeal to the Colorado Court of Appeals ("Court of Appeals"). Later, petitioners filed a Motion to Remand to the District Court for consideration of their Motion for Relief from Judgment and Disqualification of Judge, which the Court of Appeals first denied and later granted on March 16, 1987. On remand, the Trial Court denied the Motion for Relief from Judgment and Disqualification of Judge and reaffirmed its previous decision. The Court of Appeals affirmed the decision of the Trial Court on March 31, 1988 and denied petitioners' Petition for Rehearing on April 28, 1988.

Petitioners filed their Petition for Writ of Certiorari with the Colorado Supreme Court on May 31, 1988. That court denied petitioners' writ

on August 29, 1988. On September 20, 1988, the Court of Appeals issued a Stay of its Mandate in the matter, pending a resolution by this Court of petitioners' Petition for Writ of Certiorari.

Federal questions raised in state courts below:

a. Whether or not the Act applies to the Project has been contested throughout the proceedings below. The question was raised in the pleadings, Motion for Summary Judgment, briefs and oral argument before the Court of Appeals, and in petitioners' Petition for Writ of Certiorari to the Colorado Supreme Court. The Trial Court and the Court of Appeals determined that the Act applied to the Project and the Colorado Supreme Court denied certiorari.

b. The issue of the Trial Judge's possible bias against the petitioners was raised on a Motion for Remand directed to the Court of Appeals immediately after petitioners first learned of the judge's inherent conflict. The issue was considered

by the Trial Court on petitioners' Motion for Relief from Judgment and for Disqualification of Judge and denied. On appeal, the disqualification issue was briefed and argued before the Court of Appeals and included in petitioners' Petition for Writ of Certiorari to the Colorado Supreme Court. The Court of Appeals rejected petitioners' claim and the Colorado Supreme Court denied certiorari.

REASONS FOR GRANTING THE PETITION

I. THE PROJECT DOES NOT COME WITHIN THE PURPOSE OR SCOPE OF THE ACT, SINCE CONGRESS NEVER INTENDED THAT IT APPLY TO THE SALE OR LEASE OF VIRTUALLY ALL INTERESTS IN REAL ESTATE THAT INCLUDE THE RIGHT TO EXCLUSIVE USE.

This case gives the Court an opportunity to restore sanity to the application and scope of an important federal statute. The Court of Appeals has authored the most radical, wildly unprecedented expansion of the Act to date. If sustained, virtually every transaction involving the sale or lease of real property will be drawn into the maelstrom of the Act. Apartment complexes, hotels and motels, mini-warehouse projects, and parking garages, to name but a few -- all would be potentially subject to

the Act's reporting and disclosure requirements and penalty provisions. Any recent real estate development involving the sale or lease of one hundred or more discrete units of property under a common marketing scheme are suddenly vulnerable.

Absolutely no support or authority exists to support this quantum leap the Court of Appeals has taken in broadening the Act's scope and reach.

A brief review of the Act's legislative history will put the Court of Appeals' decision in perspective.

Beginning with hearings before the Senate Special Committee on Aging, the Senate determined that the burgeoning interstate land sales industry contained a disreputable element which was exploiting purchasers, particularly elderly purchasers. Powell, Powell on Real Property, Volume 5, ¶ 758.1 (1988) ("Powell"). Congress recognized that the sale of undeveloped subdivided land in resort and retirement areas had become a

major business. Persuaded that this business had attracted some large scale, "get rich quick" promoters, Congress enacted the Act to protect the consumer from overreaching and sharp practices. Id.

Congress was particularly concerned with widespread abuses where purchasers unknowingly bought land in swamps, deserts and the like. Id. In such cases, unwary purchasers' dreams of second homes, retirement sites or speculative gain were often shattered and their investments lost. Hearings on S.B. 2672 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 89th Congress, 2d Session 2 (1966) ("1966 Hearings").

Congress also meant to address the sales methods employed by some developers. Powell, Volume 5, ¶ 758.2[1]. The widespread use of sight-unseen sales techniques was a particularly disturbing aspect of the marketing process. Second-hand descriptions, half-truths, omissions

and outright lies were deemed significant problems. 1966 Hearings, supra.

In short, the general purpose of the Act was to prohibit and punish fraud in land development enterprises. McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975). The underlying purpose of the Act was to ensure that a buyer, prior to purchasing certain kinds of undeveloped real estate, was provided facts which would enable him to make an informed decision about purchasing the property. Law v. Royal Palm Beach Colony, Inc., 578 F.2d 98 (5th Cir. 1978).

The present case does not involve the sale of "swamp land" to an unwary purchaser. Rather, it involves the sale of two luxury condominium units in a world famous Colorado ski resort to a sophisticated and wealthy foreign investor who personally inspected and was well acquainted with the Project, which was well under construction when the original purchase agreements were entered into. The property is not swamp land and

respondent stands in stark contrast to the vulnerable, unwary purchaser with whom Congress was concerned.

More recently, several courts have held that condominiums are "lots" for purposes of the Act, thus changing a statute originally intended to regulate the interstate sale of undeveloped, subdivided land, to one which regulates the sale of condominiums. Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1984).

During the entire course of the present litigation, petitioners have contested the application of the Act to condominiums. They have argued that the Act is concerned with "the sale or lease of lots in a subdivision," 15 U.S.C. § 1702 (a) (1); § 1702 (b) (1)-(5), and that those "lots" should be given their common meaning. "Words in a statute are to be given their plain and ordinary meaning." Jones v. Hanley Dawson Cadillac Co. 848 F. 2d 803, 807 (7th Cir. 1988). Black's Law Dictionary defines "lot" as "[a]ny portion, piece, division or

parcel of land," Black's Law Dictionary 853 (Revised Fifth Edition 1979). (Emphasis added.) The title of the Act itself is indicative of the fact that it was aimed at regulating interstate land sales activities.[1] Thus, both the Act and the common meaning of the word "lot" indicate that it refers to land, not improved real property.

Even if condominiums are "lots" for purposes of the Act, petitioners' parking spaces are not condominiums in any event. This question is vital here because the Act exempts developments of less than 100 lots. 15 U.S.C. § 1702 (b) (1). The

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[1] Congress described the problem as follows:

> Purchasers living in the same state where the land was located or living out of state were persuaded to buy land that they had never seen by sophisticated sales forces promising that [the] land (which might be under water or suitable only for grazing purposes) was a good investment, suitable for homesites and easily resalable. (Emphasis added.) H.R. Rep. No. 154, 96th Cong., 1st Sess. 30,31 reprinted in 1979 U.S. Code Cong. & Admin. News 2317, 2346.

Project contains a total of 140 units. The parties agree that 33 of the units are condominiums. But what about the 107 parking spaces?

When petitioners were completing construction of the Project, they were obliged to convey a block of fifty parking spaces situated in a large, open underground garage to the former owner of the land to make up for surface parking lost when the improvements were built. In order to effect the conveyance, petitioners attempted to condominimize the parking spaces so that fee simple title could pass. As was done by developers of many other similar projects in Vail, petitioners listed them in the Project's condominium declaration.

But Colorado law does not permit this. The Colorado Condominium Act requires that condominiums consist of an "enclosed room or rooms." C.R.S. § 38-33-103. Indeed, a proposal introduced several years ago in the Colorado legislature and supported by the mobile home

industry would have expanded the definition of condominiums to include real estate without enclosed rooms, but the proposal did not pass. H.B. 1081, 54th Colorado General Assembly, 1st Reg. Sess. (1983). Thus, the parking spaces are not and cannot be condominiums. Indeed, one of respondent's original claims for relief urged that the parking spaces are neither condominiums nor merchantable as such. (Complaint ¶ 13)

In their briefs before the Court of Appeals, petitioners emphasized that their parking spaces were not condominiums and could not count as "lots" for the purposes of the Act, thus qualifying their Project for the 100 lot exemption.

Then comes the Court of Appeals with its astounding, unprecedented finding: "It is irrelevant whether the parking units are condominiums pursuant to Colorado law." Giralt v. Vail Village Inn Associates, 759 P.2d 801, 807-808 (Colo. App. 1988). The parking spaces are lots for the purposes of the Act since they "are interests in real estate and

a form of ownership of space to which the owners have the right to exclusive use . . . ." Id.

This was pure evasion. The legal status of the parking spaces could not be more relevant and the Court of Appeals was irresponsible to suggest otherwise. Because they cannot be condominiums, it is likely that the parking spaces revert to being general common elements, as at least one court has held in analogous circumstances. Daytona Development Corporation v. Bergquist 308 So. 2d 548, 549 (Fla. App. 1975) In their present form, it is extremely doubtful they are valid interests in real estate and a form of ownership conveying rights to exclusive use. The American real estate industry depends on precise and well understood definitions of the various types of real property and the kinds of interests people can have in them. It simply won't do to leave such interests, including the Project's parking spaces, in legal limbo.

As long as the legal status of these parking spaces remains unsettled, it is indisputable that they

are not marketable under Colorado law, cannot be individually sold or leased, and thus cannot be "lots" within the meaning of the Act. The Court of Appeals' decision to apply the Act to parking spaces, whether or not they are condominiums, is contrary to the Act's language and relevant Colorado law. 759 P.2d at 807.

The Act's express provisions clearly apply only to the "sale or lease of lots." 15 U.S.C. § 1703 (a). At the very least, the Court of Appeals should have acknowledged that the legal status of the parking spaces was a material question which should have made the Trial Court's summary judgment inappropriate.

The Court of Appeals' unprecedented extension of the Act's reach, if left undisturbed by this Court, will create great confusion, consternation and unwarranted expense involved in complying with the Act's reporting and disclosure requirements. Even small developers and business people would risk liability under the Act as a

consequence of how parking spaces, heretofore mere stripes of paint on pavement, are described and perhaps assigned for exclusive use. Leasehold interests, small commercial developments, and the like, are potentially included, depending only on the fortuity of whether and how many spaces in an adjoining parking lot are allocated for individual use. This result truly is far afield from Congress' original intent to curtail the fraudulent sale of undeveloped or semi-developed land. H.R. Rep. No. 154, 96th Cong., 1st Sess. 30, 31 reprinted in 1979 U.S. Code Cong. & Admin. News 2317, 2346.

The breadth of the Court of Appeal's holding is breathtaking for its expansive, almost unlimited scope: any interest in real estate, as long as it includes the right to exclusive use, is within the ambit of the Act. No other reported decision anywhere has taken the Act to such absurd limits--and herein lies the true violence done to the statute by its decision. The Court of Appeal's reasoning and holding stands in total isolation, unable to

withstand fair-minded scrutiny. This Court should not acquiesce in this example of unjustified and unwarranted judicial legislation.

II. THE TRIAL JUDGE'S REFUSAL TO DISQUALIFY HIMSELF, IN THE FACE OF SECRET KNOWLEDGE OF POSSIBLE BIAS, VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

A. The Appearance of Bias on the Part of the Trial Judge Created an Inherent Conflict Which Should Have Required His Recusal.

The Court of Appeals' Opinion correctly reflects that ten days prior to scheduled oral argument, petitioners filed their motion for remand with that court for determination of a motion for relief from judgment and for disqualification of the trial judge.

What is not so apparent is that the filing was precipitated by information petitioners had only recently become aware of through the Colorado Supreme Court's decision in Inquiry Concerning William L. Jones, a District Judge, 728 P.2d 311 (Colo. 1986). That decision, in turn, made reference to a private reprimand issued to Judge Jones in December 1983 by the Commission on Judicial Discipline ("Commission"), at a time when the Commission was chaired by Blanche T. Cowperthwaite, mother of the two petitioners most prominent in developing the Project.

As subsequently became known, Judge Jones admitted to recognizing the unusual Cowperthwaite name. This is not surprising, as Mrs. Cowperthwaite had been involved in Eagle County business and community affairs since the Town of Vail was founded twenty six years ago. Even so, other than reviewing the "entire court file," he took no further steps to determine the existence of a conflict (Order Denying Disqualification at 2).

There was no way for the petitioners or Mrs. Cowperthwaite to have challenged the propriety of Judge Jones hearing the original case. Judge Jones was the only person who could verify both the family relationship and Mrs. Cowperthwaite's financial interest in the Project which, by his own admission, would have prompted him to recuse himself. (Order Denying Disqualification at 2, 4).

Due to the secrecy of the Commission's deliberations, affidavits submitted with petitioners' motions by Charles Cowperthwaite and Blanche Cowperthwaite were largely limited to telling of Mrs. Cowperthwaite's 12 year service on the Commission and her tenure as its chairperson. The contents of a confidential affidavit submitted directly to Judge Jones by Mrs. Cowperthwaite are unknown to petitioners.

The information about Mrs. Cowperthwaite's interest in the Project was close at hand. The Cowperthwaite-Vail, Ltd. Limited Partnership Agreement referred to in the court file (Complaint

¶ 2) was of public record in the small Eagle County Courthouse where the chambers and courtroom used by Judge Jones were located. Judge Jones had immediate access to these documents which would have disclosed Mrs. Cowperthwaite's financial interest in the petitioner entity, Cowperthwaite-Vail, Ltd., which owned 90% of the Project. Moreover, an inquiry of petitioners or their counsel would have disclosed her financial interest and that she is the mother of petitioners James and Charles Cowperthwaite. The Trial Judge's failure to make such an inquiry, in light of his admitted awareness of a possible relationship, suggests that he was concerned only with the most technical application of the rules governing disqualification of a judge.

The decisions of the Colorado courts, properly applied and adhered to, should have required the trial judge to recuse himself in this case. The Colorado Supreme Court has held that it is an abuse of discretion for a trial judge not to

recuse himself where it may appear to the parties or to the public that he may be biased or prejudiced. Johnson v. District Court, 674 P.2d 952, 956 (Colo. 1984). Recusal is appropriate even if the judge is convinced of his own impartiality. Id. Since appearances can be as damaging to public confidence in the courts as actual bias or prejudice, the courts scrupulously avoid even the appearance of same. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

More importantly, this Court has recognized that, under appropriate circumstances, recusal of a state court judge on the grounds of bias and prejudice can be constitutionally required. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 815, 821 (1986). The safeguards afforded by the due process clause of the Fourteenth Amendment are triggered whenever the actions of a state court judge in failing to recuse himself "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

fundamental.'" Aetna Life, 475 U.S. at 821, citing Patterson v. New York, 432 U.S. 197, 201-02 (1977). Surely the "conscience of our people" would be deeply offended by a judicial system which permits a member of the judiciary to decide a dispute in a manner directly adverse to the personal and financial interest of an individual who had previously taken a significant role in reprimanding him. The disputed claims concerning petitioners' property interests were thus adjudicated without the due process protections mandated by the Fourteenth Amendment.

The injustice created by the Trial Judge's inherent conflict unfortunately went uncorrected by the Colorado courts. This result, however, should not stay this Court's hand in effectuating a meaningful remedy for petitioners. Because of the constitutional dimension to petitioners' deprivation, this Court should act to ensure that petitioners finally receive due process.

B. The Confidential Nature of Colorado's Judicial Disciplinary System is Further Reason Why the Trial Judge's Recusal Should Have Been Mandatory.

The confidential nature of Colorado's judicial disciplinary system placed petitioners in a unique and vulnerable position before the Trial Court. The Trial Judge alone knew of his possible bias against the mother of the petitioners James and Charles Cowperthwaite. He chose not to tell anyone of the problem. Instead, he opted to take refuge in the veil of secrecy created by this disciplinary system.

The Commission is composed of ten members, four of whom are non-lawyers like Mrs. Cowperthwaite. It has jurisdiction over the conduct of justices and judges who serve in the Colorado state court system. Under Article VI, Section 23 (3) (g) of the Colorado Constitution, Sections 24-72-401 and 402 of the Colorado Revised Statutes, and

Rule 6 of the Colorado Rules of Judicial Discipline, all proceedings before the Commission are confidential prior to the filing of a recommendation of discipline to the Colorado Supreme Court.

The veil of confidentiality remains even after a judge has been privately reprimanded or censored by the Commission. The Colorado scheme of confidentiality regarding judicial discipline is similar to that procedure used in 17 other states. Wehmhoefer, "The Confidentiality of Judicial Disciplinary Proceedings," The Colorado Lawyer 1043 (1988). Under such procedure, judges in 18 states thus enjoy a special protection not afforded others who may be charged with misconduct relating to the performance of their official duties.

This Court has made clear that judges are not "anointed priests" deserving special protection not afforded other public servants. Bridges v. California, 314 U.S. 252, 291-92 (1941). The "special protection" afforded the Trial Judge by Colorado's confidentiality scheme enabled him to

conceal his involvement in proceedings before the Commission to the detriment of parties whose misfortune it was to have their mother serving as a chairperson of that body at the time the judge was disciplined. Because of the secret nature of the system, petitioners were completely ignorant of the inherent conflict their case presented to the Trial Judge. Clearly, this fact only heightens the inappropriateness of the Trial Judge's actions. Fully cognizant of the parties' lack of knowledge, the situation should have cried out for the Trial Judge's recusal on the court's own motion. In failing to do so, the injury to petitioners' due process rights becomes self evident.

On recommendation of the Commission, Judge Jones was publically reprimanded by the Colorado Supreme Court -- the first time in history that court had taken such an action. Inquiry Concerning William L. Jones, 728 P. 2d 311; Miller, "State's Top Jurist Would Open Probes of Judges to Public," The Denver Post (September 13,

1987) ("Miller"). Judge Jones failed to rule timely on a "relatively uncomplex" civil case involving numerous elderly people in a dispute with the seller of timeshare units in a resort condominium. He took 27 months to make his decision. The court said he had failed to dispose of business promptly and also had "willfully or persistently failed to perform (his) judicial duties . . . ." 728 P. 2d at 314.

The Colorado Supreme Court's reprimand was issued partly because it wasn't the first time Judge Jones had been tardy in making a decision, noting that in December, 1983, the Commission had privately reprimanded Judge Jones for a two year delay in rendering a decision in another case. 728 P. 2d at 312. It is now apparent that Mrs. Cowperthwaite presided over the Commission hearings that culminated in such reprimand. How ironic that Judge Jones's ruling against her sons was made from the bench, instantaneously after hearing oral arguments by counsel.

The Chief Justice of the Colorado Supreme Court has gone on record advocating that formal disciplinary proceedings against judges be made public. Miller, supra. Strangely, the Colorado Supreme Court was unanimous in not wishing to hear arguments in this case where the issue of confidentiality, and its impact on these petitioners, was so pronounced.

It is unfortunate when voluntary public servants, such as members of state judiciary commissions, should suffer injury to themselves and to members of their families while carrying out their duties. How much worse if the very court system, whose integrity they worked to maintain, fails to protect them from the bias of a judge who they may have disciplined.

Tremendous progress has been made in recent years to reduce secrecy in public affairs. Sunshine laws are in effect everywhere; Congress and many state legislatures have passed freedom of information laws requiring government agencies to

disclose information they possess upon request. It is improbable this case would ever have come before this Court if the secrecy provisions of the Commission had not deprived petitioners of a trial before an incontrovertibly impartial tribunal.

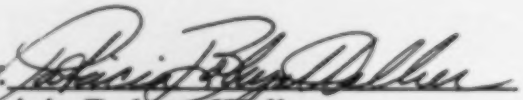
How sad for the country and its people if the last bastion of secrecy in government should turn out to be the American judiciary.

CONCLUSION

The Court of Appeals' misapplication of the Act to virtually all interests in real estate carrying the right to exclusive use, coupled with the denial of due process to petitioners, represent special and important reasons justifying review of the Court of Appeals' decision in this case. Accordingly, this Court should grant the petition and issue its writ of certiorari to the Colorado Court of Appeals.

Respectfully submitted this 23 day of November, 1988.

PENDLETON & SABIAN, P.C.

By: 

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